

SECOND REGULAR SESSION
SENATE COMMITTEE SUBSTITUTE FOR

SENATE BILL NO. 1213

92ND GENERAL ASSEMBLY

Reported from the Committee on Ways and Means, March 18, 2004, with recommendation that the Senate Committee Substitute do pass.

4326S.04C

TERRY L. SPIELER, Secretary.

AN ACT

To amend chapter 196, RSMo, by adding thereto six new sections relating to tobacco product manufacturers, with penalty provisions.

Be it enacted by the General Assembly of the State of Missouri, as follows:

Section A. Chapter 196, RSMo, is amended by adding thereto six new sections, to be known as sections 196.1010, 196.1013, 196.1016, 196.1019, 196.1022, and 196.1025, to read as follows:

196.1010. As used in sections 196.1010 to 196.1025, the following terms mean:

(1) "Brand family", all styles of cigarettes sold under the same trademark and differentiated from one another by means of additional modifiers or descriptors including but not limited to "menthol", "lights", "kings", and "100s", and includes any brand name alone or in conjunction with any other word trademark, logo, symbol, motto, selling message, recognizable pattern of colors, or any other indicia of product identification identical or similar to, or identifiable with, a previously known brand of cigarettes;

(2) "Cigarette", the same meaning as such term is defined in section 196.1000;

(3) "Director", the director of the Missouri department of revenue;

(4) "Escrow-electing manufacturer", any tobacco product manufacturer that is not a participating manufacturer;

(5) "Master settlement agreement", the same meaning as such term is given in section 196.1000;

(6) "Participating manufacturer", the same meaning as such term

is given in section II(jj) of the master settlement agreement, as defined in section 196.1000, and all amendments thereto;

(7) "Qualified escrow fund", the same meaning as such term is defined in section 196.1000;

(8) "Stamping agent", a person that is authorized to affix tax stamps to packages or other containers or cigarettes under chapter 149, RSMo, or any person that is required to pay the tax imposed under section 149.160, RSMo, on other tobacco products;

(9) "Tobacco product manufacturer", means an entity that after the date of enactment of this section directly and not exclusively through any affiliate:

(a) Manufactures cigarettes anywhere that such manufacturer intends to be sold in the United States including cigarettes intended to be sold in the United States through an importer, except where the importer is an original participating manufacturer as that term is defined in section II(hh) of the master settlement agreement that will be responsible for the payments under the master settlement agreement with respect to the cigarettes as a result of the provisions of section II(mm) of the master settlement agreement and that pays the taxes specified in section II(z) of the master settlement agreement, and provided that the manufacturer of such cigarettes does not market or advertise such cigarettes in the United States;

(b) Is the first purchaser anywhere for resale in the United States of cigarettes manufactured anywhere that the manufacturer does not intend to be sold in the United States; or

(c) Becomes a successor of an entity described in subdivision (1) or (2) of this section.

(10) "Units sold", the same meaning as such term is defined in section 196.1000.

196.1013. 1. Every tobacco product manufacturer whose cigarettes are sold in this state whether directly or through a distributor retailer or similar intermediary or intermediaries shall execute and deliver to the director, on a form or in the manner prescribed by the director a certification no later than the thirtieth day of April each year certifying that as of the date of such certification such tobacco product manufacturer is a participating manufacturer or is in full compliance

with sections 196.1000 and 196.1003, including all installment payments required by section 196.1019. Such certification shall include the email address, mailing address, and telephone and fax numbers of the manufacturer, or its registered agent, which such manufacturer shall update as necessary to keep such information current.

(1) A participating manufacturer shall include in its certification a list of its brand families. The participating manufacturer shall update such list thirty days prior to any addition to or modification of its brand families by executing and delivering a supplemental certification to the director.

(2) An escrow-electing manufacturer shall include in its certification:

(a) A list of all of its brand families and the number of units sold for each brand family that were sold in the state during the preceding calendar year;

(b) A list of all of its brand families that have been sold in the state at any time during the current calendar year;

(c) Indicating by an asterisk, any brand family sold in the state during the preceding calendar year that is no longer being sold in the state as of the date of such certification; and

(d) Identifying by name and address any other manufacturer of such brand families in the preceding or current calendar year.

The escrow-electing manufacturer shall update such list thirty days prior to any addition to or modification of its brand families by executing and delivering a supplemental certification to the director.

(3) In the case of an escrow-electing manufacturer, such certification shall further certify:

(a) That the escrow-electing manufacturer is registered to do business in the state or has appointed an agent for service of process and provided notice of the appointment as required in section 196.1016;

(b) That if the tobacco product manufacturer is a participating manufacturer, that such manufacturer has made all payments required under the terms and conditions of the master settlement agreement; if the tobacco product manufacturer is a non-participating manufacturer, that such manufacturer has established and continues to maintain a qualified escrow fund, as defined in section 196.1000, and executed a

qualified escrow agreement that has been reviewed and approved by the director and that governs the qualified escrow fund;

(c) That such escrow-electing manufacturer is in full compliance with this section and section 196.1003, and any regulations promulgated under either section;

(d) a. The name, address, and telephone number of the financial institution where the escrow-electing manufacturer has established such qualified escrow fund required by section 196.1003 and all regulations promulgated under that section; and

b. The account number of the qualified escrow fund and any subaccount number for the state; and

c. The amount the escrow-electing manufacturer placed in the fund for cigarettes sold in the state during the preceding calendar year, the date, and amount of each such deposit, and such evidence or verification as may be deemed necessary by the director to confirm compliance with the requirements of this subparagraph. A copy of the non-participating manufacturers qualified escrow account information, including any subaccount information required by subparagraph b. of this subsection from the financial institution shall serve as evidence for verification under this subparagraph. Such financial information shall contain a letter from the financial institution and a copy of the escrow agreement governing such funds; and

d. The amount and date of any withdrawal or transfer of funds the escrow-electing manufacturer made at any time from the fund or from any other qualified escrow fund into which it ever made escrow payments under section 196.1003 and all regulations promulgated thereto.

(4) A tobacco product manufacturer may not include a brand family in its certification unless:

(a) In the case of a participating manufacturer, the manufacturer affirms that the brand family is to be deemed to be its cigarettes for purposes of calculating its payments under the master settlement agreement, as defined in section 196.1000, for the relevant year, in the volume and shares determined pursuant to the master settlement agreement; and

(b) In the case of an escrow-electing manufacturer, the

escrow-electing manufacturer affirms that the brand family is to be deemed to be its cigarettes for purposes of section 196.1003. Nothing in this section shall be construed as limiting or otherwise affecting the state's right to maintain that a brand family constitutes cigarettes of a different tobacco product manufacturer for purposes of calculating payments under the master settlement agreement or for purposes of section 196.1003.

(5) The tobacco product manufacturer shall maintain all invoices and documentation of sales and other such information relied upon for such certification for a period of five years, unless otherwise required by law to maintain them for a greater period of time.

2. By January 1, 2005, the director shall develop and make available for public inspection or publish on its web site a directory listing of all tobacco product manufacturers that are in compliance with the certification and escrow fund provisions of section 196.1003 as of April 30, 2004. By July 1, 2005, the director shall update such directory listing of all tobacco product manufacturers that have provided current and accurate certifications conforming to the requirements of subsection 1 of this section and all brand families that are listed in such certifications, except:

(1) The director shall not include or retain in such directory the name or brand families of any tobacco product manufacturer that fails to provide the required certification or whose certification the director determines is not in compliance with subdivisions (2) and (3) of subsection 1 of this section, unless the director has determined that such violation has been cured to the satisfaction of the director;

(2) Neither a tobacco product manufacturer nor brand family shall be included or retained in the directory if the director concludes that:

(a) Any escrow payment required under section 196.1003 for any period for any brand family whether or not listed by such escrow-electing manufacturer has not been fully paid into a qualified escrow fund governed by a qualified escrow agreement that has been approved by the director or a tobacco product manufacturer has not maintained full compliance with the provisions of the master settlement agreement from the date such manufacturer first signed said agreement;

or

(b) Any outstanding final judgment including interest thereon for violations of section 196.1003 has not been fully satisfied for such brand family and such manufacturer;

(3) The director shall update the directory as necessary in order to correct mistakes and to add or remove a tobacco product manufacturer or brand family to keep the directory in conformity with the requirements of sections 196.1010 to 196.1025. The director shall, by e-mail or other practical means to each stamping agent and to each retailer who supplies an e-mail address for that purpose, transmit notice of any addition to or removal from the directory of any tobacco product manufacturer or brand family. Unless otherwise provided by agreement between a stamping agent and a tobacco product manufacturer, the stamping agent shall be entitled to a refund from a tobacco product manufacturer for any money paid by the stamping agent to the tobacco product manufacturer for any cigarettes of the tobacco product manufacturer in the possession of the stamping agent on the date of notice by the director of the removal from the directory of that tobacco product manufacturer or the brand family of the cigarettes. Unless otherwise provided by agreement between a retail dealer and a stamping agent or a tobacco product manufacturer, a retail dealer shall be entitled to a refund from a stamping agent or a tobacco product manufacturer for any money paid by the retail dealer to such stamping agent or tobacco product manufacturer for any cigarettes of the tobacco product manufacturer still in the possession of the retail dealer on the effective date of removal from the directory of that tobacco product manufacturer or brand family of cigarettes. The director shall not restore to the directory the tobacco product manufacturer or the brand family until the tobacco product manufacturer has paid each stamping agent or retail dealer any refund due;

(4) Every stamping agent shall provide and update as necessary an electronic mail address to the director for the purpose of receiving any notifications that may be required by sections 196.1010 to 196.1025;

(5) The director shall electronically transmit to each stamping agent notice of any addition to or removal from the directory of any tobacco product manufacturer or brand family;

(6) Not less than fifteen days before the removal from the directory of an escrow-electing manufacturer or a brand family of a tobacco product manufacturer, the director shall provide notice to the manufacturer or its registered agent, by e-mail or other practical means, of the director's proposed determination and the basis for the determination. An escrow-electing manufacturer or a brand family of a tobacco product manufacturer may challenge such notice and impending removal by seeking an injunction in a court of competent jurisdiction of this state, or other means of relief as such court may determine.

3. It shall be unlawful for any person to affix a stamp to a package or other container of cigarettes of a tobacco product manufacturer or brand family not included in the directory, or to sell, offer or possess for sale in this state cigarettes of a tobacco product manufacturer or brand family not included in the directory.

4. Notwithstanding subsection 3 of this section, twenty-one days following the date on which the director has provided notice to a stamping agent of the removal of a brand family or manufacturer from the directory, the stamping agent may continue to stamp and sell cigarettes affected by the notice that the stamping agent had purchased before the director provided notice of removal, and such cigarettes shall not be subject to subsection 2 of section 196.1022.

5. A retailer may purchase cigarettes from a stamping agent and sell such cigarettes at retail for fifty-one days following the date on which the director has provided notice to a stamping agent of the removal of a brand family or manufacturer from the directory and such cigarettes shall not be subject to subsection 2 of section 196.1022.

196.1016. 1. Any nonresident or foreign escrow-electing manufacturer that has not registered to do business in this state as a foreign corporation or business entity shall as a condition precedent to having its brand families listed or retained in the directory appoint and continually engage without interruption the services of an agent to act as agent for the service of process on whom all process, and any action or proceeding against it concerning or arising out of the enforcement of sections 196.1003 and 196.1010 to 196.1025 may be served in any manner authorized by law. In the event such agent is not located in this state, any process served on such agent shall also be published in at least one

major newspaper in this state for a period of seven days. Such publication, if necessary, and service shall constitute legal and valid service of process on the escrow-electing manufacturer. The escrow-electing manufacturer shall provide the name, address, phone number, and proof of the appointment and availability of such agent to the satisfaction of the attorney general.

2. The escrow-electing manufacturer shall provide notice to the director thirty calendar days prior to termination of the authority of an agent and shall further provide proof to the satisfaction of the director of the appointment of a new agent no less than five calendar days prior to the termination of an existing agent appointment. In the event an agent terminates an agency appointment, the escrow-electing manufacturer shall notify the director of the termination within five calendar days and shall include proof to the satisfaction of the attorney general of the appointment of a new agent.

196.1019. 1. Not later than twenty days after the end of each calendar quarter and more frequently if so directed by the director each stamping agent shall submit such information as the director requires to facilitate compliance with this section, including but not limited to a list by brand family of the total number of cigarettes or in the case of roll your own the equivalent stick count for which the stamping agent affixed stamps during the previous calendar quarter or otherwise paid the tax due for such cigarettes. The stamping agent shall maintain and make available to the director all invoices and documentation of sales of all escrow-electing manufacturer cigarettes and any other information relied upon in reporting to the director for a period of five years.

2. The director is authorized to disclose the information received under sections 196.1010 to 196.1025, to the attorney general and may share such information with other federal, state, or local agencies only for purposes of enforcement of sections 196.1010 to 196.1025, or corresponding laws of other states.

3. The director may require at any time from the escrow-electing manufacturer proof from the financial institution in which such manufacturer has established a qualified escrow fund for the purpose of compliance with section 196.1003 of the amount of money in such fund exclusive of interest, and the amount and date of each deposit to such

fund, and the amount and date of each withdrawal from such fund.

4. In addition to any other information required to be submitted by law, the director may require a stamping agent or tobacco product manufacturer to submit any additional information including but not limited to samples of the packaging or labeling of each brand family, as is necessary to enable the director to determine whether a tobacco product manufacturer is in compliance with sections 196.1010 to 196.1025.

5. To promote compliance with the provisions of sections 196.1010 to 196.1025, the director may promulgate rules requiring a tobacco product manufacturer subject to the requirements of subdivision (2) of subsection 1 of section 196.1013 to make escrow deposits which shall be in installments during the year in which the sales covered by such deposits are made. The director may require production of information sufficient to enable the director to determine the adequacy of the amount of the installment deposit. The director may require installment payments where the director reasonably concludes that an escrow-electing manufacturer may not fully and timely comply with section 196.1000 and where an escrow-electing manufacturer has not made an escrow deposit under section 196.1000 during the preceding calendar year.

196.1022. 1. In addition to or in lieu of any other civil or criminal remedy provided by law, upon a determination that a stamping agent or any person has violated subsection 3 of section 196.1013 or any regulation adopted pursuant thereto, the director may revoke or suspend the license of any stamping agent in the manner provided in chapter 149, RSMo. Each stamp affixed and each sale or offer to sell cigarettes in violation of subsection 3 of section 196.1013 shall constitute a separate violation. The director may also impose a civil penalty in an amount not to exceed the greater of five hundred percent of the retail value of the cigarettes or five thousand dollars upon a determination of a violation of subsection 3 of section 196.1013 or any regulations adopted pursuant thereto.

2. Any cigarettes that have been sold, offered for sale, or possessed for sale in this state in violation of subsection 3 of section 196.1013 shall be deemed contraband and such cigarettes shall be subject

to seizure and forfeiture as provided by law, and all such cigarettes so seized and forfeited shall be destroyed and not resold.

3. The attorney general on behalf of the director may seek an injunction to restrain a threatened or actual violation of subsection 3 of section 196.1013, or subsection 1 or 4 of section 196.1019 by a stamping agent and to compel the stamping agent to comply with such provision. In any action brought under this section, the state shall be entitled to recover the costs of investigation, costs of the action, and reasonable attorney fees.

4. It shall be unlawful for a person to sell or distribute cigarettes, or acquire, hold, own, possess, transport, import, or cause to be imported cigarettes that the person knows or should know are intended for distribution or sale in the state in violation of subsection 3 of section 196.1013. A violation of this section is a class A misdemeanor.

5. A person who violates subsection 3 of section 196.1013 engages in an unfair practice in violation of section 407.020, RSMo.

196.1025. 1. A determination of the director not to list or to remove from the directory a brand family or tobacco product manufacturer shall be subject to review under chapter 621, RSMo.

2. The first report of stamping agents required by subsection 1 of section 196.1019 shall be due thirty days after the effective date of sections 196.1010 to 196.1025; the certifications by the tobacco product manufacturer described in subsection 1 of section 196.1013 shall be due forty-five days after such effective date; and the directory described in subsection 2 of section 196.1013 shall be published or made available within ninety days after such effective date.

3. The director may promulgate rules necessary to effect the purpose of sections 196.1010 to 196.1025. Any rule or portion of a rule, as that term is defined in section 536.010, RSMo, that is created under the authority delegated in this section shall become effective only if it complies with and is subject to all of the provisions of chapter 536, RSMo, and, if applicable, section 536.028, RSMo. This section and chapter 536, RSMo, are nonseverable and if any of the powers vested with the general assembly pursuant to chapter 536, RSMo, to review, to delay the effective date, or to disapprove and annul a rule are subsequently held unconstitutional, then the grant of rulemaking

authority and any rule proposed or adopted after August 28, 2004, shall be invalid and void.

4. In any action brought by the state to enforce sections 196.1010 to 196.1025, the state shall be entitled to recover the costs of investigation, expert witness fees, costs of the action, and reasonable attorney fees.

5. If a court of competent jurisdiction determines that a person has violated sections 196.1010 to 196.1025, the court may order any of such person's profits, gains, gross receipts, or other benefits from the violation to be disgorged and paid to the state treasurer for deposit in the state general revenue fund, to be used primarily to fund the enforcement of sections 196.1010 to 196.1025. Unless otherwise expressly provided the remedies or penalties provided by sections 196.1010 to 196.1025 are cumulative to each other and to the remedies or penalties available under all other laws of this state.

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